No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership,

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED.

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Appellant respectfully petitions for a rehearing of this court's affirmance of the judgment of the trial court granting appellee's motion for summary judgment.

The complaint sought recovery of the purchase price of brandy based upon an agreement alleged to have been entered into on June 12, 1944. The crux of this court's opinion is in the statement that no agreement appears to have been made on that day. The court expressly refrained from considering the negotiations and agreements prior to June 12, 1944, stating that it is "immaterial, for this action was not based on any agreement made prior to June 12, 1944, but was based on the order hereinabove described —the order of June 12, 1944. No prior agreement was mentioned or referred to in the complaint."

In this we think the court adopted an outmoded and erroneous construction of the pleading and of the rule relating to the admissibility of evidence. We think the court was required to consider the prior negotiations and

agreements. During the entire period involved, only one final agreement was entered into between the parties—the evidence, contained in the affidavits, deposition, and interrogatories, shows that only one subject of negotiation and agreement existed between them. Whether the agreement was entered into on June 12, 1944, or the day before or after, or the week before or after, it would have been admissible on a trial, and therefore, should have been considered by the trial court on the motion for summary judgment, and certainly by this court, on appeal therefrom.

Undoubtedly, if the complaint had alleged that the agreement was entered into "on or about June 12, 1944", instead of "on June 12, 1944", the court would, under the present day enlightened construction of pleadings, have ruled that evidence of a contract, containing the terms pleaded, entered into a week before, would have been admissible in support of the complaint. Since the statute of limitations is not involved, since only one agreement was entered into between the parties during the period involved, since the facts show that the parties obviously did come to terms, if not on June 12, 1944, then a few days before, further confirmed by the writing of June 12, 1944, how is appellee prejudiced or misled by the failure to plead the facts with precision?

Rule 43(a) of the Rules of Civil Procedure states:

> ". . . All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, *the statute or rule which favors the reception of the*

evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. . . ." (Italics ours.)

The Federal decisions uniformly hold that the Rules of Civil Procedure provide for the widest admissibility possible under State or Federal law of relevant evidence.

Commercial Banking Corp. v. Martel, 123 F. (2d) 846 (C. C. A. 2);

National Battery Co. v. Levy, 126 F. (2d) 33 (C. C. A. 8);

New York Life Ins. Co. v. Seighman, 140 F. (2d) 930 (C. C. A. 6);

U. S. v. Vehicular Parking, Ltd., 52 Fed. Supp. 751 (D. C.-Del.).

The California state law on the subject is as follows: Section 469, Code of Civil Procedure:

"VARIANCE DEEMED IMMATERIAL UNLESS IT MISLED ADVERSE PARTY: ORDER TO AMEND. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been misled, the court may order the pleading to be amended upon such terms as may be just."

Section 470, Code of Civil Procedure:

"IMMATERIAL VARIANCE, HOW PROVIDED FOR. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs."

These sections have been liberally construed by the state court:

Consolidated Pipe Co. v. Wolski, 211 Cal. 563, 296 Pac. 277;

Thompson v. M. K. & T. Oil Co., 5 Cal. App. (2d) 117, 42 P. (2d) 374;

Ogden v. United Bank & Trust Co., 206 Cal. 571, 275 Pac. 430.

In *Jaffe v. Stone,* 18 Cal. (2d) 146 at 153, 114 P. (2d) 335, the Supreme Court of California stated that the doctrine that "the allegations of a pleading will be most strongly construed against the pleader . . . (has been) . . . long repudiated in this state."

On the subject directly in point we cite the following from 17 Corpus Juris Secundum 1164:

> "Although precision may not in all cases be material, the day on which the contract was made should be alleged.
>
> "The day on which the contract was made must be stated, although the precise day may not be material. The general principle is that in declaring on a parol or simple contract, the day when the contract is alleged to have been made is not material, but where time is a vital element in plaintiff's case, it must be alleged with certainty."

Time, of course, is not an element in the present case—the action was filed well within any statute of limitations.

Some of the California cases construing Section 469, Code of Civil Procedure, are as follows:

In *Wetmore v. City of San Francisco,* 44 Cal. 295, it was held that in an action to recover money an allegation in the complaint of the precise date the money became due

is not a material one and the plaintiff may prove an indebtedness at the time of the institution of the suit.

In *Bancroft Co. v. Haslett,* 106 Cal. 151, 39 Pac. 602, it was held that in an action for conversion where the date of the conversion was alleged to be July, 1892 and the proof showed a conversion on February 21, 1891, the variance was immaterial.

In *Biven v. Bostwick,* 70 Cal. 639, 11 Pac. 790, it was held that in an action to enforce a promise alleged to have been made on a certain day, the plaintiff was entitled to recover on proof that the promise was made at any time before the commencement of the action; he need not have proved that it was made on or about the time alleged in the complaint.

In *Hannel v. Bates,* 12 Cal. App. (2d) 67, 54 P. (2d) 1132, it was held that an allegation of a written three year extension did not preclude proof of a two year extension.

In *Johnson v. DeWaard,* 113 Cal. App. 417, 298 Pac. 92, it was held that where the plaintiff pleaded an oral agreement, evidence of a written agreement did not prejudice, nor mislead, the defendant.

In this connection we call the attention of the Court to the fact that Rule 56(c) of the Rules of Civil Procedure provides that on a motion for summary judgment there should be considered the pleadings, depositions, admissions on file, and affidavits—not merely the complaint alone.

It may be true, as the court in its opinion says, that the complaint contains some legal conclusions but these are

mere surplusage and ample evidence appears in the affidavits, deposition, and interrogatories to require the reversal of a summary judgment. The matter before the trial court and this court was not a demurrer or a motion for judgment on the pleadings, but a motion for a summary judgment—the *facts* as they appeared in the papers before the court and as they might appear on a trial should govern the court's decision and not a mere imperfection in pleading.

The decision of this court, furthermore, leaves the case dangling in the air and tends to a multiplicity of actions. Impliedly the court leaves the door open to a new action by the appellant, since a summary judgment based upon a defect in pleading or upon a contract alleged to have been executed on a precise date, would not be a bar to a new action on a contract alleged to have been executed on another date. Clearly the summary judgment rule was never designed for this accomplishment.

The decision is entirely out of harmony with the controlling authorities and a rehearing should be granted to the end that due reconsideration may be given thereto.

Respectfully submitted,

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Attorneys for Appellant.

Certificate.

The undersigned, one of the attorneys for appellant herein, hereby certifies that in his judgment the foregoing petition is well founded and that it is not interposed for delay.

January 25, 1946.

AARON ELMORE,
Of Counsel for Appellant.